



**Internet Domain Name Fraud – New Criminal and Civil
Enforcement Tools**

Testimony of

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**Before the House
Subcommittee on Courts, the Internet and Intellectual Property**

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Mr. Chairman and Members of the Subcommittee, Good morning. I am Timothy Trainer, President of the International AntiCounterfeiting Coalition (IACC). On behalf of the IACC, I would like to thank the Committee for the opportunity to testify on an issue of great importance to intellectual property owners, Internet users, and the public at large – the collection, availability, use, and, most importantly, the accuracy of identification information collected from domain name registrants by Registrars.

The IACC is the largest organization dealing exclusively with issues involving intellectual property theft. The IACC has approximately 140 members who represent a cross-section of industries, including the automotive, electrical, motion picture, software, sound recording, apparel, luxury goods, personal care and pharmaceutical sectors. The total annual revenues of IACC members exceed US\$650 Billion. The objective that brings such diverse industries together is their need to protect their intellectual property and their customers from those who would steal such property.

Initially, we apologize for our short submission on this issue, but will work with the Subcommittee and staff to continue providing input on this issue and this bill. I begin first by underscoring the fact that our comments are limited to the relationship between WHOIS and trademark enforcement issues and the proposed new subparagraph (e) of Section 1117 of Title 15, United States Code and leave to my copyright industry colleague on the panel to address the proposed changes affecting the copyright law and copyright owners. It is clear, however, that most, if not all, trademark owners are also copyright owners and, therefore, we have a significant overlap of interest and agree with the copyright industry's views. Second, on behalf of IACC members, we are prepared to work with the Subcommittee and staff toward passage of a bill that provides effective protection for intellectual property owners and will result in a more effective WHOIS system that assists law abiding parties. We seek provisions that deliver what the Registrar Accreditation Agreement¹ (hereinafter "RAA" or "Agreement") promises and that responds to internet users' ability to use WHOIS effectively.

Although different industries have different experiences and challenges when attempting to protect their intellectual property assets, one thing is clear, WHOIS is still problematic for many companies. In July 2001, I was asked to testify before this Subcommittee and did so, supporting the view that the WHOIS database not only needed to be publicly accessible, but accurate. In addition, I indicated that rather than legislation, the Registrars needed to meet the obligations of the Registrar Accreditation Agreement by ensuring the accuracy of information that is provided by registrants. This hearing is evidence that the hoped-for improvements of WHOIS have not occurred and my members have provided examples of the problems they encounter using WHOIS.

The IACC's testimony will address two general issues. First, I will address the ongoing problems of WHOIS and the resulting elements of the current problems. Second, I will address the extent to which the proposed amendment might address the problem.

¹ Registrar Accreditation Agreement (RAA) (17 May 2001) (Appendices posted: November 25, 2002, January 23, 2003, and April 3, 2003). <http://www.icann.org>.

WHOIS: Current Problems

Essentially, two fundamental shortcomings undermine confidence and reliance on WHOIS:

- Inadequate obligations on Registrars to check information submitted by applicants for Registered Names and
- Ease of applicants to submit false information and continue using registered domain names.

What is commonly referred to as the WHOIS database is the collection of information gathered by a Registrar concerning active Registered Names.² On the one hand, the Registrar is required to obtain and maintain this information. On the other hand, the Registered Name Holders must enter into a registration agreement with Registrars and provide a minimum amount of accurate and up to date information regarding their contact information.³ Despite the RAA's provisions,

²RAA at 3.3 Public Access to Data on Registered Names. "During the term of this Agreement:

3.3.1. At its expense, Registrar shall provide an interactive web page and a port 43 Whois service providing free public query-based access to up-to-date (i.e. updated at least daily) data concerning all active Registered Names sponsored by Registrar for each TLD in which it is accredited. The data accessible shall consist of elements that are designated from time to time according to an ICANN adopted specification or policy. Until ICANN otherwise specifies by means of an ICANN adopted specification or policy, this data shall consist of the following elements as contained in Registrar's database:

- 3.3.1.1. The name of the Registered Name;
- 3.3.1.2. The names of the primary nameserver and secondary nameserver(s) for Registered Name;
- 3.3.1.3 The identity of Registrar (which may be provided through Registrar's website;
- 3.3.1.4 The original creation date of the registration;
- 3.3.1.5 The expiration of the registration;
- 3.3.1.6 The name and postal address of the Registered Name Holder
- 3.3.1.7 The name, postal address, e-mail address, voice telephone number and (where available) fax number of the technical contact for the Registered Name; and
- 3.3.1.8 The name, postal address, e-mail address, voice telephone number and (where available) fax number of the administrative contact for the Registered Name.

³3.7.7 Registrar shall require all Registered Name Holders to enter into an electronic or paper registration agreement with Registrar including at least the following provisions:

3.7.7.1 The Registered Name Holder shall provide to Registrar accurate and reliable contact details and promptly correct and update them during the term of the Registered Name registration, including: the full name, postal address, e-mail address, voice telephone number, and fax number if available of the Registered Name Holder; name of authorized person for contact purposes in the case of an Registered Name Holder that is an organization, association, or corporation; and the data elements listed in Subsections 3.3.1.2, 3.3.1.7 and 3.3.1.8.

3.7.7.2 A Registered Name Holder's willful provision of inaccurate or unreliable information, its willful failure promptly to update information provided to Registrar, or its failure to respond for over fifteen calendar days to inquiries by Registrar concerning the accuracy of contact details associated with the Registered Name Holder's registration shall constitute a material breach of the Registered Name Holder-registrar contract and be a basis for cancellation of the Registered Name registration.

3.7.7.3 Any Registered Name Holder that intends to license use of a domain name to a third party is nonetheless the Registered Name Holder of record and is responsible for providing its own full contact information and for providing and updating accurate technical and administrative contact information adequate to facilitate timely resolution of any problems that arise in connection with the Registered Name. A Registered Name Holder licensing use of a Registered Name according to this provision shall accept liability for harm caused by wrongful use of the Registered Name, unless it promptly discloses the identity of the licensee to a party providing the Registered Name Holder reasonable evidence of actionable harm.

3.7.7.4 Registrar shall provide notice to each new or renewed Registered Name Holder stating:

- 3.7.7.4.1 The purposes for which any Personal Data collected from the applicant are intended;

there is not sufficient deterrence to stop the practice of individuals obtaining Registered Names by using false information. Some applicants have provided clearly bogus telephone numbers (000-000-0000 or 555-555-5555), cities (Blahville, AH), zip codes (00000) or indicated that the contact information is not available (N/A) and have still successfully obtained Registered Names, indicating an absence of oversight by Registrars. There are times when existing addresses are used, but not one that actually belongs to the person operating the Registered Name. Another ploy of those who trade in counterfeit goods is to use a proxy service to obtain a Registered Name so that the contact information is that of the proxy service, which in turn may not have received accurate information from the person who seeks anonymity in the first place. This adds another layer for the person seeking to remain beyond the reach of the authorities, intellectual property owners, or consumers.

To the extent that the information was initially accurate, members have reported that attempts to contact some Registered Name Holders have been time consuming and expensive because information is not updated. One trademark owner, attempting to resolve a trademark infringement case, found that a business having a New York City address and contact information had moved to New Jersey two years earlier. The information about current location was obtained by the trademark owner's attorney going to the old address, learning that the business had moved and checking records held by the state, not the Registrar's WHOIS database.

Based on our efforts to prepare for this hearing, members have provided a list of Registered Names that all had false information in the WHOIS database. A glance at the list leaves no question as to why false contact information would be used. One member company reported at least 15 cases of false WHOIS information during the past year when it tried to pursue those offering counterfeit goods. These sites facilitate the trade in counterfeit merchandise. As long as a name, phone number and other contact information appear to be legitimate, there is no verification by the Registrars, despite the language of the Agreement to verify the information.⁴

The list of sites having false contact information associated with them has resulted in increased investigative and legal costs to the trademark owners. It is the IACC's position that the accuracy of registrant information is critical to allowing intellectual property owners to enforce their rights over the Internet and for providing consumers with some recourse against counterfeiters and pirates.

3.7.7.4.2 The intended recipients or categories of recipients of the data (including the Registry Operator and others who will receive the data from Registry Operator);

3.7.7.4.3 Which data are obligatory and which data, if any, are voluntary; and

3.7.7.4.4 How the Registered Name Holder or data subject can access and, if necessary, rectify the data held about them.

⁴ RAA at 3.7.8 Registrar shall abide by any specifications or policies established according to Section 4 requiring reasonable and commercially practicable (a) verification, at the time of registration, of contact information associated with a Registered Name sponsored by Registrar or (b) periodic re-verification of which such information. Registrar shall, upon notification by any person of an inaccuracy in the contact information associated with a Registered Name sponsored by Registrar, take reasonable steps to investigate that claimed inaccuracy. In the event Registrar learns of inaccurate contact information associated with a Registered Name it sponsors, it shall take reasonable steps to correct that inaccuracy.

If a businessman wants to acquire a Registered Name, if a parent wants to know who owns the website that is distributing harmful toys, if a consumer wants to know who owns the website that is offering discounted pharmaceuticals, or if a trademark or copyright owner wants to know who owns the Registered Name from which a counterfeit version of its products are being sold, they have one place to turn – WHOIS. We commend this effort to impose higher penalties on persons who deliberately disregard their obligations and submit false information. However, half of the problem may rest with the Registrars because of the absence of an effective method of verifying the information submitted to them, including cases in which the requested name appears suspicious on its face.

Registrars, once on notice of false contact information, should be subject to a requirement that in such a case they must contact the registrant and if no accurate and verifiable contact information is provided in a short, fixed period of time, the site will be shut down. It is clear from the information collected by our members that the Registrars are not fulfilling their obligations to ensure the accuracy of the information it is receiving. Registrars should also have increased obligations to verify the information.

Proposed Amendment 15 U.S.C. 1117 and Criminal Penalty

The Subcommittee has proposed the following language to be added to Title 15 U.S.C. 1117(e):

“(e) In a case of a violation under this section, occurring at or in connection with an online location, the violation shall be considered to be willful for purposes of this section if the violator, or a person acting in concert with the violator, knowingly provided material and misleading false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering a domain name used in connection with the online location, or in maintaining or renewing such registration.”

The IACC commends the effort to impose greater liability on those who provide false information regarding their contact information. The deterrent effect of the provision will depend upon the willingness of federal prosecutors to take cases and use these provisions in any prosecution of counterfeiting cases to increase penalties.

Regarding the specific language, there is no current definition for “online location”. For specificity, this may mean the Registered Name for the domain name used by the person who has provided false contact information.

Next, we recommend that the provision be broad enough to subject persons submitting *any* false information to these penalties. Essentially, anyone deliberately submitting any false information could be punished by the provisions of this bill. Thus, in addition to information such as an address, telephone and facsimile number, this could include internet protocol addresses and other possible information.

In addition, in view of the existence of a definition of “violator” as referenced in 15 USC 1114(2)(E), a clarification may be necessary to avoid any confusion.

Next, in addition to the violator who provided the false information, we recommend that the provision also subject a person who causes false information to be provided to a Registrar to be sanctioned. Under the proposed language, it appears to be the intent that both a violator and a person acting in concert can be brought within the scope of the provision.

The IACC would support the proposal’s applicability to persons who register and obtain names that are never “used in connection with the online location”. This would subject those who obtain Registered Names through the use of false information, but do not have active websites, to the penalties intended by this proposal.

In addition, IACC members believe that the proposal could be broadened to impose liability on parties who, having initially provided accurate information to obtain the Registered Name, thereafter fail to provide updated information. The current proposal addresses acts of affirmatively providing false information, but not willful refusals or failure to provide valid contact information thereafter. Registered Name Holders should be required to provide valid contact information not only upon renewal, but also during the course of each registration period within a certain period of time after the former contact information is no longer valid. This is asking Registered Name Holders to do nothing more than individuals are asked to do with a driver’s license when there is a change of residential address or one moves to a new state and needs to obtain a new license.

The IACC also supports the criminal sentencing recommendation as reflected in the bill to add the provision to Title 18, U.S.C. Section 3559, although we have no opinion regarding the specific recommendation of seven years.

Regarding the actual text of the proposed new paragraph in Section 3559, the IACC is interested in learning of the possibility of including similar language in this Section that appears in the proposed 15 U.S.C. 1117(e), referring to a person acting in concert with the defendant. Similar to our recommendation for 1117(e), we recommend a parallel provision to subject persons causing false information to be provided to be within the scope of Section 3559. This would encompass offenders who either directly submit false information or cause false information to be submitted.

“(e) SENTENCING ENHANCEMENT FOR FALSIFICATION RELATING TO DOMAIN NAMES IN CONNECTION WITH OFFENSES.—The maximum imprisonment otherwise provided by law for a felony offense shall be increased by 7 years if, in furtherance of that offense, the defendant knowingly provided material and misleading false contact information to a domain name registrar, domain name registry, or other domain name registration authority in connection with a domain name registration. For purposes of this subsection, the term ‘domain

name' has the meaning given that term in section 45 of the Act entitled 'An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes' approved July 5, 1946 (commonly referred to as the 'Trademark Act of 1946'; 15 U.S.C. 1127).''

Given the linkage of this provision to another felony offense, it would seem that a defendant would have to be found guilty of trafficking in counterfeit goods under 18 U.S.C. 2320 to have this as a possible sentencing departure for the add-on. We would hope that this might encourage more federal prosecutors to accept counterfeiting cases.

Conclusion

The IACC appreciates the opportunity to testify before the Subcommittee and will be happy to work with the Subcommittee in moving this bill forward. The IACC and its members will endeavor to provide information when possible. I will attempt to answer any questions the Members may have.

Web sites with False WHOIS Information

2004watch.com
 Allreplicas.com
 Authenticstyles.com
 Barbiehandbags.com
 Basement-prices.com
 Clubreplica.com
 Deluxwatches.com
 DSforless.com
 Elitereplicawatches.com
 Eurofakes.com
 Eurotimesinc.com
 Everyswiss.com
 Exclusivereplicas.com
 Fakeoakleys.com
 Fancyfakes.com
 Finereplicawatch.com
 Fineluxurytime.com.cn
 Fineluxurytime.net
 Finewatchreplicas.com
 Foxyfash.com
 Getthatlook.com
 Globalreplicas.com
 Go-replicas.com
 Goreplicas.com
 Gradeoneswiss.com
 Howtobeaplaya.com
 Idealwatches.com
 Identicalwatches.com
 Ilovemyreplica.com
 Knockoffbagsnmore.com
 Luxuryreplicas.com
 Megawatchsale.com

Myreplicaswatch.com
 Paradisewholesale.com
 Perfectswiss.com
 Planetreplica.com
 Preciseknockoffs.com
 Qualityhanbags.com
 Replica-planet.com
 Replicabiz.com
 Replicacenter.com
 Replicadetails.com
 Replicagenuine.com
 Replicagod.com
 Replicaking.com
 Repicalord.com
 Repicanews.com
 Replicaokley.net
 Repicapalace.com
 Repicasonstock.com
 Replicasworld.com
 Replicawatch.us
 Replicawatches.com
 Solidreplicas.com
 Swiss-copies.com
 Swisswatchreplica.com
 Time4replicas.com
 Unlimitedreplicas.com
 Urbanmusic2000.com
 Watchesperfection.com
 Watchreplica1.com
 Warehousetimes.com

Examples of Contact Information

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